the first place and each has long outlived whatever usefulness it may have had. Like the national ownership cap, these rules merely restrain broadcasters from fairly competing with other media giants, such as vertically integrated cable companies, that face no ownership restrictions of comparable magnitude.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))))))	MB Docket No. 02-277
Cross-Ownership of Broadcast Stations and Newspapers	)))	MM Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	))))	MM Docket No. 01-317
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("Paxson") hereby submits these Comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] Paxson urges the Commission to (1) relax significantly the current 35% national broadcast ownership cap and to phase out the cap over the

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[1] 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317; Definition of Radio Markets, MM Docket No. 00-244, *Notice of Proposed Rule Making*, FCC 02-249 (rel. September 23, 2002) (the "*Ownership NPRM*"). *See also* FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules, *Public Notice*, DA 02-2476 (rel. October 1, 2002).

next several years; (2) to retain for UHF broadcasters the full benefit of the current UHF discount; (3) to ease the most restrictive elements of its current duopoly policies; (4) to repeal the newspaper/broadcast cross-ownership rule; and (5) to refine the radio/television cross ownership rule. These changes are necessary to modernize the Commission's broadcast ownership rules in light of the current robust competitive media landscape and to bring to consumers the full promise of competition made by Congress through the Telecommunications Act of 1996.

I. INTRODUCTION

As the largest television broadcast station group-owner in America, Paxson is intimately concerned with the important ownership issues raised in this proceeding. Paxson and its subsidiaries own and operate 61 full power analog television stations and 17 low-power and translator stations. Paxson stations have been transitioning to digital aggressively, and 26 Paxson stations are on the air with full-power digital facilities. Paxson has used its many stations to launch the nation's seventh competitive broadcast network, offering family-oriented programming free of the excessive violence, sex, and foul-language common to much of today's broadcast and cable network fare. Paxson is proud to have "proven that money can be made with family friendly programming,"[2] and believes that, if given the chance, the market will demand that large media owners live up to the same standard.

Paxson long has been a supporter of relaxation of the Commission's ownership rules in the face of the ever-growing competition in the television broadcasting and video delivery industries. As Congress recognized in passing the 1996 Telecommunications Act, relaxation of outmoded regulations will stimulate competition and produce media that are responsive to local markets.[3] Paxson participated in the 1998 Biennial Review proceeding, arguing that the Commission should retain the UHF discount, relax its restrictions on duopolies involving stations in separate DMAs, and increase the national ownership cap to 40%.[4] The Commission accepted the former arguments and rejected the latter.[5] Paxson now comes before the Commission to argue in favor of a much more ambitious deregulatory program.

Paxson commends the Commission on its decision to address necessary changes to its broadcast ownership rules in an omnibus proceeding. Logic dictates that

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[2] Remarks Of Commissioner Michael J. Copps To United States Conference Of Catholic Bishops, Dallas, Texas, April 26, 2002, available at http://ww.fcc.gov/speeches/copps/2002/spmjc204.html.

[3] Section 202(h) of the Telecommunications Act of 1996, requires the Commission to: "review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and . . . determine whether any of such rules are necessary in the public interest as the result of competition . . " and to " . . . repeal or modify any regulation it determines to be no longer in the public interest." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996).

[4] *See* Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed July 21, 1998 ("*Paxson Biennial Comments*"); Reply Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed August 21, 1998.

[5] 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd 11058, 11078-80 (retaining UHF discount), 11072-75 (retaining 35% national ownership cap) ("*1998 Biennial Review*"), *reversed and remanded*, *Fox Television Stations v. FCC*, 280 F.3d 1027 (2000) ("*FOX TV Stations*"), *rehearing granted in part*, 293 F.3d 537 ("*FOX TV Stations Rehearing*"); *see also* Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12924-29 (1999) (relaxing duopoly rule to allow ownership of stations with overlapping Grade B contours in separate DMAs).

the rules be considered together because each rule impacts the others, and the Commission's goal should be to achieve a logically consistent system of broadcast ownership rules that can stand for years to come.[6] The first step to accomplishing this goal is recognizing the proper frame through which Section 202(h) of the Communications Act requires the Commission to view its ownership regulations. Both the language of 202(h) and its legislative history plainly indicate that Congress expected the Commission to presume that competition and the free market are adequate to ensure that the public interest is served and to retain only those ownership restrictions that can be affirmatively justified as necessary in the public interest either despite existing competition or due to a lack of it.[7]

As the D.C. Circuit has recognized, the Telecommunications Act of 1996 is fundamentally a deregulatory statute.[8] The courts and at least one Commissioner have recognized that the 1996 Act instituted a presumption in favor of relaxation and repeal of media ownership restriction.[9] Indeed, the very language "necessary in the public interest" should be held to require the Commission to discard any rule that cannot be shown to be strictly necessary to the public interest.[10] At the very least, the Commission should be required to announce a plan for easing these rules over time.

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[6] *Ownership NPRM*, ¶ 8.

[7] *See Fox TV Stations*, 280 F.3d at 1048.

[8] *See Id.* at 1033 (". . . Congress instructed the Commission, **in order to continue the process of deregulation**, to review each of the Commission's ownership rules every two years . . .").

[9] *See Id.* at 1033, 1048; *Ownership NPRM* at 66 (Separate Statement of Commissioner Martin).

[10] *See GTE Service Corp. v.* FCC, 205 F.3d 416 (D.C. Cir. 2000) (interpreting "necessary in § 251(c)(6) "collocation of equipment necessary for interconnection" to

Although the Commission has at times appeared to resist this interpretation of the 1996 Act,[11] it is unlikely that any rules founded on a weaker standard will pass muster with the Courts. The Commission has argued, for example, that it is irrational for Congress to require a higher standard for retaining its rules than is required for enacting them.[12] This argument fails, however, because it is perfectly consistent with Congress's deregulatory purpose to isolate a group of regulations (*i.e.* the Commission's ownership rules) and single them out for higher scrutiny. The Commission also has argued that the "necessary in the public interest" language in the 1996 Act is similar to language in the Communications Act of 1934 which has been held to require only the basic public interest rationale.[13] This argument also fails because the 1996 is fundamentally *deregulatory* in nature, whereas the 1934 Act was intended to set the basic framework of communications *regulation*.[14] It is decisive that Congress in Section 202(h) did not require the Commission to review all its rules on a biennial basis and discard those that do not meet the "necessary" standard, but only the ownership regulations. Congress plainly meant for the Commission to undertake a searching review of its ownership regulations and retain only those that are strictly necessary to its mission of protecting the public interest. Because the law is clear and to avoid being right back where it

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mean "indispensable"); *See also Fox TV Rehearing*, 293 F.3d at 540 (declining to determine standard created by Section 202(h)); *Ownership NPRM*, ¶ 18 (requesting comment on court decisions and proper standard to be applied under Section 202(h)).

[11] *See FOX TV Rehearing*, 293 F.3d at 539 (describing Commission argument against strict necessity standard); *see also Ownership NPRM*, ¶ 18 (same).

[12] *See Id.*

[13] *See Id.*

[14] *See Id.* at 539 (describing arguments in favor of strict necessity standard).

started from after another round of rulemaking, appeal, and remand, the Commission should recognize in this proceeding that Section 202(h) requires it to affirmatively justify the public necessity of each of its ownership rules. This stringent standard cannot be satisfied with respect to the ownership rules under review in this proceeding.

II. THE COMMISSION MUST LIBERALIZE ITS OWNERSHIP RULES, BUT IT SHOULD RETAIN ITS CURRENT SERVICE-SPECIFIC APPROACH AND ITS TRADITIONAL FOCUS ON DIVERSITY, COMPETITION, AND LOCALISM.

As both Chairman Powell and Commissioner Martin have observed, the broadcast ownership restrictions at issue in this proceeding are old.[15] They are old in the sense that they were enacted a long time ago, and they are old in the sense that they have become antiquated in the face of the tremendous competition existing in local and national media markets today. In their current configuration, the Commission's broadcast ownership rules bear no relation to what is needed to maintain a diverse and competitive media environment. In fact, the rules in their current form work to stifle competition and hinder the full development of the broadcast medium. The Commission must relax these restrictions to allow the full promise of broadcast competition to be realized.

Nonetheless, the Commission's ownership rules have been the fundamental reality of the broadcast industry and the rules have shaped the businesses and plans of every industry participant. It would be unwise to rashly discard any of the existing ownership rules or to attempt to replace them with an as yet undetermined single

[15] *See* 1998 Biennial Review, 15 FCC Rcd 11058, 11140 (separate statement of (then) Commissioner Michael K. Powell); *Ownership NPRM* at 66 (separate statement of Commissioner Kevin J. Martin).

ownership rule based on an as yet unexplained market/voice standard.[16] Similarly, it would be an unnecessary strain on the Commission's future resources to commit to case-by-case determinations of multiple ownership questions.[17] The strain on the Commission resources and the delay that such processes would create would all but negate the intended effect of deregulating the broadcast industry.

Instead, the Commission should maintain its basic ownership rule framework, although the rules themselves require significant revision. Specifically, the Commission should continue to observe and study broadcast ownership on both the local and national level to ensure that the policy goals of encouraging diversity, competition, and innovation continue to be satisfied.[18] More importantly, the Commission should continue its practice of maintaining straightforward rules that let industry participants know exactly what the Commission expects.[19] As the Commission moves forward into this deregulatory period, clear rules will be essential to maintaining order in what likely will be a quickly evolving marketplace.

III. THE FCC SHOULD LIBERALIZE ALL OF ITS MEDIA OWNERSHIP STANDARDS BUT DO SO BY RETAINING A SERVICE-SPECIFIC APPROACH.

The Commission requested comment chiefly on the impact that liberalizing its ownership rules will have on its traditional goals of fostering diversity, competition,

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[16] *See Ownership NPRM*, ¶ 73.

[17] *See Id.*

[18] *See Id.*, ¶¶ 29, 65 (describing traditional goals).

[19] *See e.g.* Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations; 47 C.F.R. §§ 73.1125, 73.3526 and 73.3527, *Memorandum Opinion and Order*, 14 FCC Rcd

localism, and innovation. In Paxson's view, market forces are sufficient to promote these goals and, in any case, are more likely than regulation to achieve them. There has been much debate over the potential negative effects of media consolidation, but the reality of the post-1996 Act has seen a full flowering of competition and media choice.[20] Moreover, the addition of the Internet has added an important competitor for viewers leisure time that is so vast that it could never be monopolized entirely by one or a few firms. Consequently, today the Commission has less reason than ever before to believe that its traditional goals are in danger from consolidated ownership. The Commission therefore has the leisure to consider the most prudent ways to draw down its ownership limitations over the next several years. This Biennial Review should be the first step in that process.

A. The Commission Should Immediately Increase the National Television Ownership Cap and Set a Schedule for Phasing Out the Rule Over Time.

The current rule limiting station ownership to reaching 35% of American television homes is the current incarnation of a rule originally enacted in 1941.[21] For the last 61 years, first the rule of five, then of seven, then of twelve, and finally the 35% cap have controlled the growth of national television station group ownership. The question now before the Commission, however, is whether any reason remains to continue to

11113, 11113, 11117 (1999) (describing Commission goal of promulgating clear rules that are easy to understand and administer).

[20] *See, e.g.*, Jim Rutenberg, *Fewer Media Owners, More Media Choices*, NEW YORK TIMES, December 2, 2002, available at http://www.nytimes.com/2002/12/02/business/media/02MEDI.html.

[21] *See Broadcast Services Other than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941).

exercise that control. More specifically, Section 202(h) requires the Commission to decide whether a numerical ownership cap on national broadcast ownership is necessary to promote the Commission's policy goals of competition, diversity, and localism or whether it now is appropriate to allow market forces to achieve these goals free from regulation. Paxson submits that local and national media markets have matured such that continuing the national ownership rules will no longer promote the Commission's goals, but instead will act as an artificial constraint of broadcasters' ability to compete with other media owners that do not face these types of restrictions.

1. <u>The National Ownership Is No Longer Necessary in the Public Interest.</u>

Regardless of how the Commission analyzes the national and local media markets, it must find that diversity and competition have triumphed and a healthy dose of localism continues to be served. A narrow focus on the broadcast television market reveals that consumers have far more choice in terms of both local and national program providers than at any time in the past. There now are 1,714 local broadcast television stations, 568 Class A television stations and 2,127 low power television stations. Each of these stations operates pursuant to a license that requires them to satisfy the Commission's public-interest oriented and local service requirements.[22] The

[22] *See, e.g.*, 47 C.F.R. §§ 73.670 (children's programming commercial limits), 73.671 (children's educational and informational programming requirements); 73.3526(a)(11) (FCC issues oriented programming requirements). The Commission has requested comment on whether it should replace its ownership rules with additional behavioral regulation governing local broadcasters' operations. *Ownership NPRM*, ¶ 49. Paxson opposes such additional regulation and believes that current regulations are sufficient to guarantee that the needs of local communities are met. Paxson does, however, support the Commission's recent, more aggressive stance toward enforcement of the indecency regulations. Again, however, Paxson believes that the market eventually will eliminate the gratuitous sex, violence, and foul language that characterizes much network

Commission's study of ownership concentration in ten markets nationwide shows that all but one of those markets currently enjoy more broadcast outlets owned by more different broadcasters than at any time in the past.[23] There are now seven competitive broadcast networks even though most viewers still can remember a time when they were lucky to have three network affiliates and an independent UHF channel or two on their television dials.

Just as the three-network home entertainment universe is ancient history, however, a consideration of the national broadcasting ownership cap that takes only the state of the broadcasting industry into account would seem quaint, indeed. The erosion of broadcast television's former hold on television viewers is a much remarked upon phenomenon. Today cable television and direct broadcast satellite television bring consumers so many programming choices that network prime time viewership has declined to just 57% today.[24] Moreover, the Internet, which offers consumers every type of information and commercial shopping opportunity imaginable also has begun to take a central place in a media market that increasingly rewards content providers able to reach ever-smaller fragments of what was once a mass-market audience. Outside the realm of video entertainment, broadcasters face competition for viewers time and interest from traditional media outlets like newspapers, radio, movies, home video, news and entertainment magazines and the old-fashioned but still relevant books.

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programming by turning to alternatives such as PAXTV and other family oriented programmers.

[23] *See* Scott Roberts, Jane Frenette, and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets*, September 2002.

[24] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighth Annual Report*, 17 FCC Rcd 1244, 1282.

Although these diverse media appear to broadcasters as competitors, they appear to consumers as a dizzying array of diverse and high quality entertainment and news choices. In this environment, it is difficult to believe that the Commission could find that either diversity or competition were in danger. That this diversity exists at a time when two broadcast networks currently maintain broadcast holdings that exceed the Commission's current 35% national ownership cap should not be ignored. It is difficult to see exactly what even the most powerful broadcast groups – FOX or Viacom – could do to squelch the diversity of voices and outlets that is challenging them from every direction.

Indeed there is no way to deduce from the current diverse media marketplace that the 35% ownership cap is necessary in the public interest. Even if intuition tells the Commission that increased consolidation is bad for diversity and competition, its experience with the elimination of the national radio ownership limits belies that concern. The Commission's ownership studies show that the elimination of national radio ownership limits has not led to significant declines in diversity at either the local or national level, and has not had any significant negative effect on competition or price in the local and national advertising markets.[25]

Diversity in the video delivery and greater news and entertainment media markets now is at a high enough intensity that the Commission must ask itself whether

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[25] Peter Alexander, *Radio Market Structure and Music Diversity*, Media Bureau Staff Research Paper, September 2002; George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership Format and Finance*, Media Bureau Staff Research Paper, September 2002; Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Media Markets*, Media Bureau Staff Research Paper, September 2002.

the 35% cap isn't artificially hindering broadcasters' ability to compete with media conglomerates like AOL Time Warner, Comcast, and Liberty Media which do not labor under ownership rules that are nearly so restrictive.[26]

This is particularly the case in light of the misrepresentative structure of the ownership cap. As has been pointed out in many contexts, the practice of crediting each broadcast station with all the homes in its DMA vastly overstates the actual reach of each broadcaster.[27] Testifying before Congress in July, 2001, Mel Karmazin of Viacom indicated that stations actually reach, on average, about fifteen percent of their market.[28] Similarly, NBC CEO Bob Wright has noted that even assuming a station reaches all the homes in its market, it is likely being viewed by only about 2-3% of those homes, meaning that a station with a reach of 25% under the FCC's rules, probably reaches no more than 6% of viewers at any given time.[29] Consequently, as the *Ownership NPRM* points out, broadcasters ownership limitations are based on the

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[26] *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (2001) (reversing and remanding horizontal and vertical national ownership restrictions for cable operators); *see also* Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, the Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, *Further Notice of Proposed Rulemaking*, 16 FCC Rcd 17312 (2001).

[27] As described in Section B below, even where the UHF discount is employed, actual station reach is still overstated.

[28] *See e.g.* Hearing of the Senate Commerce, Science, and transportation Committee Regarding Media Concentration, July 17, 2001 (testimony of Mel Karmazin).

[29] Statement Submitted by Lowell "Bud" Paxson, Chairman of Paxson Communications Corporation, for the Record To the Senate Commerce, Science & Transportation Committee Hearing On Broadcast Ownership, July 17, 2001.

demonstrably false premise that broadcasters reach every home in their market while cable ownership limits are based only on homes served.[30] If the ownership cap is maintained at its current level, this disparity will no doubt result in severe market distortions in the long run. The Commission should preempt this problem by increasing the broadcast national ownership cap now.

2. The Commission Should Immediately Raise the Ownership Cap to 50%, Then Increase the Cap by 2.5% Biennially.

Paxson believes that the wisest course is to liberalize the current rule at a pace that allows for all existing station combinations, but preserves the Commission's flexibility to exercise some control if increasing consolidation begins to have ill effects.

Such ill effects are unlikely. The Commission has recognized that consolidation and vertical integration have and are likely to continue to improve the news and entertainment content of the major broadcast networks[31] and that network owned and operated stations tend to program larger amounts of higher quality news and public affairs programming.[32] These findings, coupled with the developments of the deregulated radio industry give the Commission more than enough evidence to

[30] *Ownership NPRM*, ¶¶ 154-155.

[31] Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programming*, September 2002; Amendment of Section 73.658(g) of the Commission's Rules - The Dual Network Rule, *Report and Order*, 16 FCC Rcd 11114, 11122-23, 11123-24 (2001); Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12930 (1999) ("*Duopoly Order*").

[32] Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programming*, September 2002.

significantly relax the national ownership rule now and set a timetable for further liberalization of the rule.

Accordingly, the Commission should immediately increase the ownership cap to 50%, which will accommodate all existing broadcast combinations and give some additional room for growth. The Commission also should establish a presumption that it will increase the cap by at least 2.5% on a biennial basis until the cap reaches 60%. As part of each biennial review proceeding, the Commission should evaluate developments in the television broadcast and greater media markets and determine whether it should increase the cap more quickly or slowly. Once the cap reaches 60%, the Commission should continue to monitor conditions in the broadcast industry, but without a presumption that additional relaxation of the cap will occur. If conditions remain as strongly competitive as they are now, further relaxation may be in order.

This course is consistent with the Commission's mandate under Section 202(h) because it would embody the Commission's judgement that the current cap is not necessary in the public interest, but that immediately eliminating any cap also is not in the public interest. For the last 60 years, broadcasters have calibrated their business activity against the background of national ownership limitations. They should now be given the opportunity to adjust those plans over time to accommodate the potential changes that unlimited national ownership could bring. Moreover, there are enough potential dangers in relaxing the cap to justify a go-slow approach.[33] Paxson reiterates

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[33] *1998 Biennial Review,* 15 FCC Rcd at 11072-75, *but see FOX TV Stations*, 280 F.3d at 1044 (describing deregulatory message of Section 202(h)); *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 171 (Sentelle, J., concurring and dissenting) ("*Sinclair*") (same).

that it expects increases in the cap to have no ill effects on diversity, competition, or localism. Section 202(h) does not, however, require the Commission to ignore concerns about possible market distortions that could be caused by increased consolidation simply because it cannot demonstrate with certainty that those effects will occur. The course Paxson proposes steers a middle course that is firmly deregulatory, but that will leave the Commission with options if market distortions occur.

B. Both Law and Logic Dictate that the Commission Retain the UHF Discount.

Unless the Commission decides to eliminate the national broadcast ownership cap immediately, it must continue to apply the UHF discount.[34] The Commission upheld the UHF discount just two years ago after compiling a full record.[35] The Commission further indicated that it would again review the issue at some point "near the completion of the transition to digital television."[36] This recent determination continues to be supported by the relevant evidence, and the DTV transition has not yet progressed to the point where additional consideration of eliminating the discount is necessary or warranted.

1. <u>The Commission's Reasons For Maintaining the UHF Discount Remain Apt.</u>

The Commission elected to maintain the UHF discount chiefly because of the technical inferiority of UHF signals as compared to their VHF counterparts and because

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[34] *Ownership NPRM*, ¶ 130-131.

[35] *1998 Biennial Review*, 15 FCC Rcd 11078-80.

[36] *Id.* at 11080.

of the higher operating costs associated with UHF stations.[37] Nothing has changed in the past two years to undermine those conclusions. As the Commission initially recognized in adopting the UHF discount in 1985, and has consistently affirmed, UHF signal strength declines more rapidly over distance than VHF signal strength. Consequently, UHF stations are unable, by nature, to reach as many viewers as VHF stations. This technical disparity leads to a significant economic disparity, reducing the ability of UHF stations to compete effectively with VHF stations and, potentially, adversely impacting diversity. The UHF discount therefore serves a dual purpose: first, it employs a rough and ready means of estimating the actual reach of UHF stations; and second, it provides an incentive to UHF station owners to acquire additional stations, thereby allowing them to take advantage of the efficiencies associated with group ownership without a pressing concern that they will transgress the national ownership cap. The end result of this rule is more stations, greater diversity, and greater competition. In 1985, there were 365 UHF stations operating in the United states;[38] today that number has grown to 752, a 106% increase.[39]

When the Commission upheld the UHF discount two years ago, it was fully aware of the developments since 1985 that have supposedly alleviated the technical disparity justifying the UHF discount. Specifically, the Commission considered the impact that improvements in television receiver technology and the carriage of UHF

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[37] *1998 Biennial Review*, 15 FCC Rcd at 11078-79.

[38] *See Broadcasting Cablecasting Yearbook 1985* at A-2.

[39] *See* Broadcast Station Totals as of September 30, 2002, *Press Release* (rel. November 6, 2002).

stations on cable and DBS systems have had on the continuing need for the discount.[40] It is therefore surprising that the Commission should request additional comment on this point.

Neither gains in receiver technology nor mandatory carriage of UHF signals can improve the signal strength of UHF stations. The fact remains that UHF stations, based on technical disparity alone, do not reach as many viewers with an over-the-air signal as VHF stations. Similarly, the inherent propagation deficiencies and lack of robustness to the UHF signal preclude it from placing a Grade B signal over as many local cable headends as their VHF counterparts, thereby potentially reducing their rights to cable carriage. Consequently, UHF stations' ability to reach both over-the-air and cable viewers in their respective markets is compromised severely.

As the Commission has recognized, UHF stations' inherent technical inferiority is accompanied by built-in economic disadvantages. Given their weaker signal strength and inability to reach as many viewers as VHF stations, UHF stations simply do not garner the same revenues or audience share ratings as their VHF counterparts. Moreover, the costs of operating a UHF station remain high, exceeding the costs incurred by VHF stations, and placing an economic burden on the owners of UHF stations. These operating costs include higher electricity costs generated by UHF stations and the greater cost of UHF antennas that Paxson has detailed in the past.[41] Even the supposed panacea of cable carriage can impose additional costs on UHF

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[40] *See 1998 Biennial Review*, 15 FCC Rcd at 11075-77, 11078.

[41] *Paxson Biennial Comments* at 11.

stations forced to provide additional technical support to provide a quality signal to local cable headends to guarantee cable carriage.

2. UHF Technical Inferiority Will Not Be Solved By the Transition to DTV.

These inequities will not be solved by the transition to digital broadcasting. Although the Commission has attempted to ameliorate the UHF/VHF disparity by allowing UHF stations to maximize their service area,[42] stations are permitted to maximize facilities only in theory; in practice, stations in the most congested markets are unable to maximize due to anticipated interference with surrounding stations.[43] If anything, the DTV transition likely will exacerbate UHF deficiencies for the 14% of people and 30% of television sets that still receive service over-the-air, due to the much discussed DTV "cliff-effect.".[44] Whereas viewers of UHF stations' over-the-air signals may have been willing to put up with minor interference to UHF stations' analog signals, they will not get that chance with DTV because once a station's signal strength falls

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[42] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report and Order*, 12 FCC Rcd 14588, 14605-06 (1997).

[43] Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Report and Order, Further Notice of Proposed Rulemaking*, 16 FCC Rcd 5946, 5967 (2001) (describing revised procedures for resolving UHF maximization proposals over 200kW); Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 1368-71 (1998) (describing objections to initial Commission decision to limit maximization requests to 200 kW).

[44] *See* Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, *First Report And Order And Further Notice Of Proposed Rule Rulemaking*, 16 FCC 2598, 2617 & n.131.

below a certain level, viewers are faced with a blue screen that will likely induce them to simply change channels.[45]

3. The UHF Discount Remains Critical to the Development of New Broadcast Networks.

The UHF discount also has produced major public interest benefits by aiding in the emergence of new competitive broadcast networks. Both FOX and PAXTV have been built largely through the acquisition of numerous UHF stations. These networks could not have been constructed had their audience reach been calculated based on the same scale used for VHF stations. After the completion of all pending transactions, Paxson stations, for example, would reach.over 63% of U.S. households if Paxson's UHF stations were considered to reach every home in their respective DMAs. With the discount, however, these stations reach only 31.5%, well under the current ownership cap.

PAXTV itself shows the value that the UHF discount has provided to television consumers. PAXTV provides a unique blend of family-friendly programming focused on core American values and free of the explicit sex, senseless violence and foul language that is found in so many television programs today. Launched in 1998, PAXTV now reaches over 87% of the country through its over-the-air broadcast distribution system and through cable and DBS carriage. Thus Paxson has expanded the array of choices available to all television viewers largely because of the flexibility the UHF discount gives station owners.

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[45] *See Id.*

Although other emerging networks such as the WB and UPN have not constructed their networks by acquiring UHF stations, they have nonetheless depended largely on UHF affiliates in the construction of their fledgling distribution networks. Of 73 stations that report WB affiliation, for example, 67 are UHF stations.[46] Similarly, of 110 station that report UPN affiliation, 92 are UHF stations.[47] To the extent that the UHF discount promotes ownership of UHF stations by large group owners capable of providing high-quality non-network fare, the discount promotes the growth of these networks by promoting the growth and strength of their affiliates.

Consequently, retaining the UHF discount is likely to encourage the emergence of a larger number of competitive broadcast networks to join the existing seven. This result is plainly in the public interest, because it increases the diversity of sources and viewpoints in every market the new network reaches. This public benefit will be particularly strong for over-the-air viewers who do not have access to nearly the diversity of voices enjoyed by cable and DBS subscribers.

4. Maintenance of the UHF Discount Satisfies Section 202(h) Because It Is Necessary in the Public Interest.

Given the significant public interests served by the UHF discount, it goes without saying that retention of the discount was necessary under Section 202(h) two years ago, and remains necessary today. There is no substitute for the benefits that the UHF discount has provided to competitive networks in terms of easing the construction of broadcast (and accompanying cable and DBS) distribution outlets. Moreover, because

[46] *See Industry In Television 2002*, 1st Ed. BIA Financial Network, Inc. (2002).
[47] *See Id.*

the UHF discount was considered fully and reaffirmed only two years ago, the FCC will bear a heavy burden to eliminate it.[48] The Commission reaffirmed this rule in 2000 based on the reasons described above, and has received no information since that could lead it to conclude that its decision was an error or that significant new facts have arisen to justify a change in the rule. Moreover, unlike the other rules at stake in this proceeding, Section 202(h)'s presumption favoring repeal of broadcast ownership limits does not apply here because the UHF discount itself is inherently deregulatory in nature, *i.e.* it is an exception to the general regulation embodied in the national ownership cap.

5. <u>If the Commission Decides to Eliminate the UHF Discount, Basic Principles of Fairness Require Grandfathering of Existing UHF Station Groups.</u>

If, in the face of all this evidence, the Commission still decides to eliminate the UHF discount, Paxson strongly urges the Commission to grandfather all ownership interests existing at the time of its decision which would not comply with the national ownership rule absent the UHF discount. Grandfathering of existing ownership interests not only would be the fairest solution but also would be consistent with established precedent.

As described above, absent the UHF discount, Paxson's ownership interests would exceed the national cap, and would continue to do so unless the Commission

[48] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *National Wildlife Foundation v. Mosbacher*, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending 2-year old rule without reasoned explanation).

raises the cap to over 60%. To require Paxson (and similarly-situated group owners) to divest their interests if the UHF discount is eliminated would be manifestly unfair and not in the public interest. Indeed, failure to grandfather Paxson's interest could lead to the demise of the nation's seventh broadcast network. Neither Paxson nor other group owners should be penalized for their compliance with the FCC's ownership rules at the time those rules were in effect. Although the FCC has in various proceedings discussed whether to retain or modify the UHF discount, it has never suggested that it would require divestitures upon a change in the rule nor has it conditioned the grant of sale applications on the outcome of pending proceedings. Moreover, requiring Paxson to divest a portion of its stations, part and parcel of the PAXTV network, could seriously hamper PAXTV's ability to compete in the network business and to expand its original program offerings.

In the face of changes to its ownership rules, the Commission has in the past grandfathered ownership interests that would not comply with the new rule. In those cases, the Commission concluded that forced divestiture would have consequences adverse to the public interest and therefore should be undertaken only in the most serious circumstances. For example, when the Commission adopted the newspaper/broadcast cross-ownership prohibition in 1975, it required ownership divestitures only in the most "egregious" of cases, recognizing that "stability and continuity of ownership do serve important public purposes."[49] In that proceeding, the

[49] Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 FCC 2d 1046, 1078, 1080 ("*1975 Second R & O*"), *recon.*